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No. 88-315

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL-SOUTHWIRE ALUMINUM CO., PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency (EPA) correctly determined that turning off air pollution control equipment at petitioner's aluminum reduction plant, which would increase fluoride emissions by more than 1,000 tons annually, would constitute a modification of a stationary source within the meaning of Section 111(a)(4) of the Clean Air Amendments of 1970, 42 U.S.C. 7411(a)(4).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 838 F.2d 835.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on February 1, 1988, and a petition for rehearing was denied on March 25, 1988. The petition for a writ of certiorari was filed on June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Clean Air Amendments of 1970, 42 U.S.C. (& Supp. IV) 7401 *et seq.*, Congress adopted a two-pronged strategy for improving air quality to protect human health and welfare. The first prong is to prevent or minimize any increases in existing levels of pollution. This policy is embodied in Section 111(b) of the Act, 42 U.S.C. 7411(b), which authorizes a system of rigorous, nationally uniform emission standards that apply to new sources of pollution and to existing sources from which emissions are increased. These standards, known as new source performance standards (NSPS), specify the maximum permissible amounts of various pollutants that may be emitted from newly constructed sources and from existing sources that have undergone a "modification." § 111(a)(2), 42 U.S.C. 7411(a)(2). The term "modification" is defined in Section 111(a)(4), 42 U.S.C. 7411(a)(4), as follows:

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

The second prong of Congress's strategy for attaining clean air is the reduction of emissions from existing, unmodified sources. One of several provisions intended to achieve this goal is Section 111(d) of the Act, 42 U.S.C. 7411(d), which provides for the States, with EPA approval, to adopt plans that include measures for reduction of emissions from existing sources of pollutants for which EPA has not

promulgated national ambient air quality standards or national emission standards for hazardous air pollutants.[1] Fluoride, which is involved in this case, is one such pollutant. In the case of these pollutants, Section 111(d) requires the States to establish standards of performance for existing, unmodified sources that would be subject to the NSPS if they were new or modified.

2. Petitioner National-Southwire Aluminum Company owns and operates a primary aluminum reduction plant in Hawesville, Kentucky, that emits fluoride in both gaseous and particulate forms. When the plant was constructed in 1969, before passage of the Clean Air Amendments of 1970, petitioner equipped the plant with wet scrubbers to control emissions of gaseous fluoride. After passage of the Clean Air Amendments, EPA determined that fluoride air pollution presents a serious threat to public welfare because it damages natural vegetation, herbivorous animals, and agricultural crops. On October 23, 1974, EPA promulgated NSPS for fluoride emissions from new and modified primary aluminum reduction plants. See 39 Fed. Reg. 37730. Kentucky was then required by Section 111(d) of the Act to adopt state standards limiting fluoride emissions from existing,

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[1] EPA has set national ambient air quality standards for six pollutants: lead, ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and particulate matter. See 40 C.F.R. Pt. 50. For these pollutants, the States are required by Section 110 of the Act to set emission standards for individual sources that are sufficiently stringent to prevent the combined pollution from all sources from exceeding the ambient air quality standards. See generally *Train* v. *NRDC, Inc.*, 421 U.S. 60, 63-67 (1975). EPA's national emission standards for hazardous air pollutants are listed in 40 C.F.R. Pt. 61, and do not apply to fluorides.

unmodified plants. Kentucky first adopted such standards in 1981, and they were approved by EPA in 1982. These standards had the effect of preventing any increase in the emission of gaseous fluorides from petitioner's Hawesville plant, but did not require petitioner to reduce those emissions. Pet. App. 3a-4a.

Thereafter, petitioner proposed to shut down the wet scrubbers at the Hawesville plant. According to data supplied to EPA by petitioner, that action would increase fluoride emissions from the plant by 1,174 tons per year.[2] Petitioner sought and obtained from Kentucky a relaxation of the State's Section 111(d) gaseous fluoride emission standard to the extent necessary to permit that increase. The relaxation, however, is not effective unless and until it is approved by EPA. See 40 C.F.R. 60.23, 60.27. Kentucky submitted a proposed form of its relaxed Section 111(d) standard to EPA for comment on March 22, 1985. The proposal included a stipulation that if petitioner turned off the wet scrubbers at its plant to take advantage of the relaxed standard, such a change in its method of operation would not be considered a "modification" that would render the plant subject to the NSPS. EPA informed Kentucky that the latter provision would not be approved. Nevertheless, on April 3, 1986, Kentucky submitted for EPA's final approval a relaxed Section 111(d) standard that includes the same stipulation. Pet. App. 4a-5a. That submission is pending before EPA.

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[2] EPA has determined that the de minimis level for fluoride emissions is three tons per year and that emissions in excess of that amount could cause damage to vegetation. 45 Fed. Reg. 52676, 52709 (1980); 40 C.F.R. 52.21(b)(23)(i). Thus, the proposed 1,174-ton annual increase is nearly 400 times the level that EPA has found to be significant. Pet. App. 12a n.8.

On August 27, 1986, petitioner requested a formal determination from EPA, pursuant to 40 C.F.R. 60.5, whether turning off the wet scrubbers at its plant would be a "modification" of a stationary source that would trigger application of the NSPS for flouride emissions. On September 22, 1986, EPA rendered a decision rejecting petitioner's contention that pollution control equipment is not part of the stationary source and concluding that turning off the scrubbers at petitioner's plant would be a modification (Pet. App. 19a-26a). EPA reasoned that the exclusion of pollution control equipment from the definition of "stationary source" would be "contrary to the plain words of the definition" and that "inclusion of air pollution control equipment as part of a stationary source is essential if the Administrator is to implement Section 111(b)" (*id.* at 21a).

3. Petitioner then sought review in the United States Court of Appeals for the Sixth Circuit, which sustained EPA's decision (Pet. App. 1a-14a). The court first rejected petitioner's contention that a "stationary source" encompasses only pollution generating equipment and therefore does not encompass an emission control system (*id.* at 8a-10a). The court reasoned that although the statutory definition of the term "stationary source" does not specifically mention pre-existing pollution control equipment, such equipment is not excluded from the definition's sweep (*id.* at 8a). Moreover, the court noted that EPA concluded when it amended the applicable regulations in 1975 that pollution control equipment is included as part of a stationary source.[3] The court found this in-

[3] On that occasion, EPA determined that if increases in pollution resulting from an operational change are offset by improvements in an existing pollution control system, the

terpretation "reasonable and not inconsistent with the statutory language," and therefore entitled to deference (*id.* at 9a-10a).

The court of appeals next held that turning off the wet scrubbers at petitioner's plant would not fall within a regulatory exception stating that the term "modification" shall not be considered to include "[t]he addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial" (40 C.F.R. 60.14(e)(5)). The court stressed that the exception does not apply to the "removal" of a pollution control system, and it explained that even the replacement of one pollution control system with another constitutes a modification if the Administrator determines that the replacement would be less environmentally beneficial, which would be the result in this case because petitioner's proposal "would leave gaseous fluorides virtually uncontrolled" (Pet. App. 10a-11a).

Finally, the court found no inconsistency between EPA's interpretation of the terms "stationary source" and "modification" and the primary role of the States in developing plans under Section 111(d) for the control of pollutants emitted from existing, unmodified plants. In the court's view, Section 111 (b) "was 'designed to prevent new [air] pollution problems' by regulating both newly-constructed sources of pollution and sources that increase their emissions," and "[t]he effect of including modified as well as newly-constructed sources under its pro-

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change would not be regarded as a modification (Pet. App. 9a, citing 30 Fed. Reg. 36946 (1974)).

visions is to establish existing levels of emissions as a baseline above which an existing source may not pollute without becoming subject to the NSPS" (Pet. App. 13a, quoting *National Asphalt Pavement Ass'n* v. *Train*, 539 F.2d 775, 783 (D.C. Cir. 1976)). "[I]t is clear," the court concluded, "that Congress intended that federal enforcement of federal air pollution standards governing new or modified stationary sources not be controlled by the states" (Pet. App. 14a).[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari therefore should be denied.

1. EPA's determination that turning off the scrubbers at petitioner's plant would constitute a "modification" is based on a straightforward application of the statutory definition of that term. Section 111(a)(4) of the Act, 42 U.S.C. 7411(a)(4) (emphasis added), provides:

> The term "modification" means any physical change in, or *change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source* or which results in the emission of any air pollutant not previously emitted.

Petitioner's aluminum reduction plant is a "stationary source" of fluoride emissions, and operating the plant without the wet scrubbers is unquestionably a "change in the method of operation" of that source. Furthermore, it is undisputed that turning off the scrubbers would "increase[] the amount of [fluoride]

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[4] Judge Boggs filed a dissenting opinion (Pet. App. 15a-18a).

air pollutant emitted" by approximately 1,174 tons per year. Thus, by the express terms of Section 111 (a)(4), turning off the scrubbers would constitute a "modification" of an existing source that, in turn, would trigger the application of the nationally uniform NSPS for fluoride emissions. As the court of appeals observed (Pet. App. 8a-9a), EPA has interpreted the statutory provisions in this manner since 1975, when it amended the implementing regulations. At the very least, this longstanding administrative position "is based on a permissible construction of the statute," and it therefore is binding on the courts. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984).

2. Petitioner makes no attempt to answer this analysis of the text and administrative interpretation of the relevant statutory provisions. Petitioner argues (Pet. 11-14), however, that EPA's decision in this case is contrary to the legislative intent underlying Section 111, because that section allows the States to regulate emissions from existing sources of pollution. This argument rests on an erroneous view of the ambit of the States' regulatory authority. Although Congress did not intend to require that *all* existing sources be retrofitted to comply with the NSPS, Congress expressly provided in Section 111 (a)(2) that those existing sources that undergo a "modification" must comply with the NSPS. Section 111 thus was intended "to prevent new air pollution problems" that might result from new sources or the modification of existing sources. S. Rep. 91-1196, 91st Cong., 2d Sess. 16 (1970).[5] For this reason,

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[5] See also H.R. Rep. 91-1146, 91st Cong., 2d Sess. 10 (1970) ("new sources may take the form either of entirely new facilities or expanded or modified facilities, or of expanded or

EPA's determination that the proposed change in the operation of petitioner's plant would constitute a modification because it would substantially increase fluoride emissions is fully consistent with the purposes of Section 111.

3. Petitioner's contention (Pet. 12-13) that EPA's interpretation, sustained by the court of appeals, would "prevent a State from correcting overly strict non-health-related emission standards" is both erroneous and irrelevant. EPA's determination in this case does not invalidate Kentucky's amendment of its Section 111(d) standard for the emission of gaseous fluorides from existing sources. Once approved by EPA, the state standard will have the force and effect of law. However, the effect of the relaxed standard is only that the state plan will not prohibit increased emissions. Such an amendment of a state plan does not serve to exempt an existing source from the overriding federal standards in the NSPS if increased emissions permitted by the state plan result from a "modification" of the source—as the increased emission of 1,174 tons of fluoride annually from petitioner's plant clearly do.

In addition, although EPA's determination regarding petitioner's proposal to shut down its pollution control equipment does have the effect in this case of preventing petitioner from taking full advantage of the State's relaxation of its Section 111(d) standard, and to that extent limits the practical impact of the State's action, that incidental effect at most implicates secondary policy considerations concerning the role of the States under the Clean Air Amendments; those considerations furnish no basis for ignoring the

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modified operations which result in substantially increased pollution").

"unambiguously expressed intent of Congress" (*Chevron*, 467 U.S. at 842-843) to require modified sources to comply with the NSPS.[6] There is no evidence of a congressional intent to exempt from the NSPS a modification of an existing facility that causes substantial increase in emissions, simply in order to enable a discharger of pollutants to take advantage of a relaxed Section 111(d) standard.

4. Finally, petitioner contends (Pet. 15-16) that the court of appeals erred in concluding that the EPA regulation that exempts specific actions from being considered "modifications" does not apply to petitioner's proposal to turn off its scrubbers. This contention is without merit and does not warrant review by this Court.

The regulation in question provides that the following does not constitute a modification (40 C.F.R. 60.14(e)(5)):

> The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

This regulation is inapplicable here for a number of reasons. First, turning off the scrubbers is not the "addition or use" of a pollution control system; as

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[6] The other policy consideration petitioner advances (Pet. 13-14)—that the court of appeals' ruling "would discourage voluntary pollution control"—likewise cannot override the explicit statement of congressional intent embodied in Section 111. Moreover, there is no reason to anticipate such a deterrent effect in the unusual circumstances of this case, which involve pollution control equipment that was voluntarily installed before the Clean Air Amendments of 1970 were passed and that remains functional and effective to this day.

the court of appeals observed, petitioner's proposal "contemplates the non-use, or *subtraction* of a pollution control device" (Pet. App. 11a (emphasis in original)). Second, the exception is expressly inapplicable to the "removal" of an emission control system, which is essentially what petitioner seeks to accomplish. Third, the exception also is expressly inapplicable to the replacement of one pollution control system by another that the Administrator finds to be "less environmentally beneficial"; here, petitioner does not even seek to "replace" its scrubbers with equally or more effective emission control equipment, and turning off the scrubbers would in any event be "less environmentally beneficial" because it would increase fluoride emissions 400-fold and "leave gaseous fluorides virtually uncontrolled" (Pet. App. 11a, 12a).[7] Finally, petitioner's interpretation of the statutory term "modification" and the regulatory exception to that term would be inconsistent with Con-

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[7] Petitioner claims (Pet. 15-16) that the court of appeals usurped the Administrator's role by holding that petitioner's proposal would be "less environmentally beneficial." Petitioner relies on the language of the regulation stating that the exception is inapplicable to a replacement of old equipment by a new system "which the Administrator determines" to be less beneficial (40 C.F.R. 60.14(e)(5)). The court below should not be faulted on this ground, because petitioner did not rely on the regulatory exception in proceedings before the Administrator (Pet. App. 10a) and therefore did not give the Administrator an opportunity to address the issue. Moreover, it is clear in this case that petitioner's proposal would be less environmentally beneficial, since it *would* result in a substantial increase in fluoride emissions that would not be offset by a decrease in emissions of another pollutant. See note 8, *infra*.

gress's overriding goal of achieving "maximum feasible control" of air pollutants (*id.* at 11a).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] As the court of appeals explained, the regulation upon which petitioner relies was intended to be a "*de minimis* exception * * * to permit a source to install a pollution control system that would bring about a major decrease in emissions of one pollutant while causing a smaller, incidental increase in emissions of another pollutant" (Pet. App. 10a, 11a, citing 39 Fed. Reg. 36948 (1974)). In this case, the increase in fluoride emissions would not be the "incidental" consequence of efforts to control emissions of another pollutant; it would be the direct consequence of the simple *decontrol* of the emission of fluorides. Moreover, the 1,174-ton increase in fluoride emissions that petitioner's proposal would bring about each year can scarcely be termed de minimis (Pet. App. 12a).

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